

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7

8 RHONDA FIRESTACK-HARVEY, LARRY  
9 HARVEY, MICHELLE GREGG, ROLLAND  
10 GREGG, and JASON ZUCKER,

11 Defendants.

12

13 No. CR-13-24-FVS

14 ORDER DENYING MOTIONS TO  
15 DISMISS ON EQUAL  
16 PROTECTION OR DUE PROCESS  
17 GROUNDS

18 THE DEFENDANTS have filed a number of motions. The Court  
19 considered their motions at a pretrial conference that was held on  
20 April 22 and 23, 2014. This order addresses the defendants'  
21 allegations that the instant prosecution is depriving them of equal  
22 protection and due process.

23 **CONGRESS AND THE DISTRICT OF COLUMBIA**

24 The defendants argue the United States Attorney's decision to  
25 prosecute them in the Eastern District of Washington violates their  
26 right to equal protection, as guaranteed by the Fifth Amendment, given  
Congress' decision to allow the medicinal use of cannabis in the  
District of Columbia. The Ninth Circuit considered and rejected a  
very similar argument in *James v. City of Costa Mesa*, 700 F.3d 394  
(9th Cir.2012) cert. denied, --- U.S. ----, 133 S.Ct. 2396 (2013).  
There, the plaintiffs were disabled residents of the State of

1 California. They challenged attempts by certain California cities to  
2 close marijuana dispensing facilities. The plaintiffs relied  
3 principally upon Title II of the Americans with Disabilities Act  
4 ("ADA"). 700 F.3d at 396. However, the plaintiffs also made an equal  
5 protection argument based upon the fact Congress did not block  
6 implementation of Initiative 59 in the District of Columbia in 2010.  
7 "Initiative 59," explained the Ninth Circuit, "suspended local  
8 criminal penalties for seriously ill individuals who use medical  
9 marijuana with a doctor's recommendation." 700 F.3d at 404. The  
10 circuit court rejected the argument that Congress' 2010 decision to  
11 allow the District of Columbia to implement Initiative 59 deprived  
12 disabled California residents of equal protection of the law:  
13

14 Congress' decision not to block implementation of Initiative  
15 59 did not result in the unequal treatment of District of  
16 Columbia and California residents. On the contrary,  
17 Congress' actions allow these jurisdictions to determine for  
18 themselves whether to suspend their local prohibitions on  
19 the use and distribution of marijuana for medical purposes.  
20 Local decriminalization notwithstanding, the unambiguous  
21 federal prohibitions on medical marijuana use set forth in  
22 the [federal Controlled Substances Act] . . . continue to  
23 apply equally in both jurisdictions, as does the ADA's  
24 illegal drug exclusion. There is no unequal treatment, and  
thus no equal protection violation.

25 700 F.3d at 405 (citation omitted).

26 **ENTRAPMENT BY ESTOPPEL**

Defendant Michelle Gregg claims state authorities misled her  
concerning the use of marijuana for medical purposes. She claims

federal authorities were equally misleading. (Defendant's Motion & Memorandum (ECF No. 213) at 31-32 (citations omitted).) She moves to dismiss the indictment on the ground she is a victim of entrapment by estoppel, which is the "unintentional entrapment by an official who mistakenly misleads a person into a violation of the law[.]" *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir.2010) (internal punctuation and citation omitted). Entrapment by estoppel is an affirmative defense. In order to prevail, Ms. Gregg must prove five elements: "(1) an authorized government official empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable." *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir.2004) (internal citations and quotation marks omitted). Ms. Gregg places great weight upon information that is contained in the Washington State Department of Health's website. The DOH has created a list of "General Frequently Asked Questions." One of them asks, "I heard the current federal administration legalized medical marijuana (cannabis). Is that true?" To that question, the DOH provided the following answer:

No, medical marijuana (cannabis) is still illegal under federal law. However, U.S. Deputy Attorney General James Cole announced updated formal guidelines for federal prosecutors in states that have laws allowing the use of medical marijuana. The guidelines do not legalize medical marijuana. The president directed federal prosecutors to consider appropriate medical use when making criminal

1       charging decisions. The guidelines only provide direction  
2       for prosecutors when reviewing medical marijuana cases.

3       (DOH, "[General] Frequently asked questions about Medical Marijuana  
4       (Cannabis) in Washington State," available at  
5       [http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuana\(Cannabis\)/GeneralFrequentlyAskedQuestions.aspx](http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuana(Cannabis)/GeneralFrequentlyAskedQuestions.aspx). (last visited April 21, 2014)). One cannot reasonably interpret  
6       the above-quoted answer as an affirmation that federal law permits the  
7       possession of marijuana for medical purposes. To the contrary, the  
8       above-quoted answer states unequivocally that the possession of  
9       marijuana remains illegal under federal law. Furthermore, the answer  
10      represents the views of the state Department of Health. At most, one  
11      could interpret the answer to suggest that, though the possession of  
12      marijuana remains illegal under federal law, the state Department of  
13      Health thinks there may be situations in which federal prosecutors  
14      will not seek the indictment of persons who possess marijuana for  
15      medical purposes. The state Department of Health does not presume to  
16      give any assurance as to when federal prosecutors will refrain from  
17      acting. Nor could the state Department of Health give any such  
18      assurance. It cannot speak for federal prosecutors. Thus, the answer  
19      given by the state Department of Health in response to a frequently-  
20      asked question will not support the defense of entrapment by estoppel.

21       **PROSCRIBING THE POSSESSION OF MARIJUANA**

22       Several defendants have devoted scores of pages in multiple  
23      memoranda arguing Congress lacks a rational basis for continuing to

1 proscribe the possession of marijuana for medical purposes. A little  
2 over three months ago, the Ninth Circuit rejected very similar  
3 arguments in an unpublished opinion. *Sacramento Nonprofit Collective*  
4 *v. Holder*, Nos. 12-15991, 12-55775, 12-16710, 2014 WL 128998, at \*1-\*2  
5 (9th Cir. Jan. 15, 2014). Although the opinion may be unpublished, it  
6 accurately states the law in the Ninth Circuit.

7 **IT IS HEREBY ORDERED:**

8 1. Defendant Jason Zucker's motion to dismiss the indictment (**ECF**  
9 **No. 205**) is **denied**.

10 2. "[Defendant Michelle Gregg's] Motion . . . to . . . Dismiss  
11 Indictment" (**ECF No. 213**) is **denied**.

12 3. Defendant Rolland M. Gregg's "Motion to Dismiss" (**ECF No. 216**)  
13 is **denied**.

14 **IT IS SO ORDERED.** The District Court Executive is hereby  
15 directed to enter this order and furnish copies to counsel.

16 **DATED** this 29th day of April, 2014.

17 s/ Fred Van Sickle  
18 Fred Van Sickle  
19 Senior United States District Judge